8-17-2017

Searle v. Searle Appellant's Brief 2 Dckt. 45029

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

Supreme Court Case Number : 45029-2017
Bingham County Magistrate Court Number: CV-2012-2611

LISA M. SEARLE nka LISA LOOSLE,

PLAINTIFF-APPELLANT

vs.

DUSTIN L. SEARLE,

DEFENDANT-RESPONDENT

Appeal from the Magistrate Court of the Seventh Judicial District of the State of Idaho,

in and for Bingham County

Hon. Scott H. Hansen, Magistrate Judge

DEFENDANT'S/RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

To eliminate the confusion caused by the shifting roles of the parties in the pleadings and for ease of understanding, the original Plaintiff and Appellant on appeal will hereinafter be referred to as "Mother" and the original Defendant and Respondent on appeal will hereinafter be referred to as "Father."

On December 16, 2016, this case came before the Magistrate Court for a trial on Father's Amended Verified Petition for Modification. This Petition sought to have child support set within the Idaho guidelines, Father be granted substantially equal physical custody, and to prevent the minor child from leaving with State of Idaho without the agreement of the parties or court order.

After trial, the Magistrate Court entered its Memorandum Decision and Order (hereinafter "Decision") on January 6, 2017. R. pp. 128-136. This Decision set child support within the guidelines and awarded primary physical custody to Father and visitation to Mother. The Decision set forth, in detail, the facts upon which the Magistrate Court relied and the findings from those facts.

Mother filed a Motion for Reconsideration requesting that the Magistrate Court reconsider its order granting Father primary custody, as Mother reversed her sworn trial statement that she was going to move to Virginia even if the B.G.S. was going to remain in Shelly. Mother provided additional statements concerning the intelligence of B.G.S., the low quality of Idaho Schools and the exceptional nature of Virginia schools. The Magistrate Court held a hearing on the Motion to Reconsider and issued an Order denying the same.

Mother requested and was granted a direct appeal to this Court.

STATEMENT OF THE FACTS

The parties were married on June 17, 2005 and had one minor child, B.G.S (born [redacted] as a result of the marriage. R. pp.14-15. The parties were divorced on September 25, 2007 pursuant to a stipulated settlement agreement. R. pp. 22-33. This agreement and order gave Mother primary physical custody with Father receiving visitation on weekends and holidays. *Id.* In January 3, 2012, Mother filed for a modification of the custody of B.G.S., reducing the time Father was allowed for visitation. R. pp. 34-51. The parties again stipulated to terms for a modified custody order. The Court issued its Custody Modification Order on August 23, 2012. R. pp. 54-71. Six days later, on August 29, 2012, Mother moved to Virginia with B.G.S. R. p. 82.

The move to Virginia created an extreme expense for Father to exercise his visitation. Father filed a Petition for Modification on October 5, 2012. R. pp. 72-74. On April 26, 2013, the Magistrate Court entered its Findings of Fact, Conclusion of Law and Order on Father's Petition for Modification. R. pp. 81-87. This Order granted Father visitation for the summer and spring break with additional fall and holiday visitation. R. p. 84. This visitation schedule required Father to fly to exercise the visitation. At the time, this visitation schedule worked, as Father was employed in North Dakota and was earning a sizable income.

On May 21, 2015, Father filed a Verified Petition for Modification. R. pp. 91-93. The Petition requested a modification of child support as Father was no longer working in North Dakota and had a greatly reduced income. Additionally, Mother had returned from Virginia with B.G.S. to the Boise area. On July 15, 2016, Father amended his Petition to include a revision of the custody and visitation time. Trial was held on the Amended Verified Petition for Modification on December 16, 2016.

At trial, Father argued that his income had been greatly diminished and required an adjustment to the child support calculations and that B.G.S. should reside with him primarily and have visitation with Mother. This request was made due to the fact that B.G.S. had been repeatedly moved by the Mother, additional moves were anticipated, and B.G.S. had not been able to remain at a single school.

At the time of trial, B.G.S. was 10 years old. Tr. p. 33 l. 2. Also at the time of trial, B.G.S. was attending her fifth (5^{th}) school. Tr. p. 33-34. Mother also indicated that she had changed residences five (5) times since the birth of B.G.S. Tr. p. 31 l. 10. Father testified that he purchased his home in Shelly, Idaho in 2011 and had lived there ever since. Tr. p. 39 ll. 8-20.

Father testified that he wanted his daughter to go to a school consistently and be able to build steady relationships with friends and family. Tr. pp. 47-48. Father testified that the communication with Mother was very frustrating, not consistent, and not good. Tr. pp. 50-51. Father testified that after Mother's 2014 return to Idaho, he attempted to get additional time with his daughter, but was not able to work that out with the Mother. Tr. pp. 69-71. Neither party was willing to give on the time they were allowed with their daughter. *Id.* Father further testified that the distance, difficult communication with Mother and consistency made it difficult to maintain a relationship with his daughter. Tr. pp. 75-78.

Mother testified that she was currently living in Meridian, Idaho but had plans to relocate to Virginia in August, 2017. Tr. pp. 28, 36. Mother testified that she would move to Virginia even if the Court ordered B.G.S. to remain in Idaho. Tr. p. 116 ll. 7-21. Mother testified that she had an internship opportunity in Virginia and hoped it would turn into an actual position but was not guaranteed. Tr. pp. 90, 108. Mother's main testimony concerning B.G.S. returning to Virginia was the gifted and talented program for B.G.S.

The parties also testified about the minor child's separation anxiety and autoimmune disorder. The testimony was that she only saw a counselor for the anxiety and a pediatric rheumatologist for the autoimmune disorder. Tr. pp. 109-110.

ISSUES PRESENTED ON APPEAL

I. Did the Magistrate err in Concluding that There Was a Material and Substantial Change of Circumstances in its January 6, 2017 Decision and Reaffirming that Decision in Its Order re Motion to Reconsider?

II. Did the Magistrate Err in Concluding that it was in the Best Interests of the Minor Child to Change Primary Custody in Its January 6, 2017 Decision and Reaffirming that Decision in Its Order re Motion to Reconsider?

III. Did the Magistrate Err in His Findings of Facts in Its January 6, 2017 Decision and in Its Order re Motion to Reconsider?

IV. Is Appellant Entitled to Attorney Fees on Appeal?

ATTORNEY FEES ON APPEAL

The Father hereby requests attorney fees on appeal pursuant to Idaho Code §12-121; Appellate Rules 40 and 41; and, all other applicable rules and statutes. I.C.§12-121 allows for attorney fees when a case is brought or defended frivolously, unreasonably or without foundation. Mother in this matter has simply asked this Court to substitute its own findings for that of the Magistrate Court. The Magistrate Court acted properly and within the bounds of its discretion. Mother's claims are without merit.

As such, Mother's request for attorney fees should be denied and fees granted for the Father.

ARGUMENT

I. DID THE MAGISTRATE ERR IN CONCLUDING THAT THERE WAS A MATERIAL AND SUBSTANTIAL CHANGE OF CIRCUMSTANCES IN ITS JANUARY 6, 2017 DECISION AND REAFFIRMING THAT DECISION IN ITS ORDER RE MOTION TO RECONSIDER?

On a permissive appeal under I.A.R. 12.1, the Court reviews the magistrate judge's decision without the benefit of a district court appellate decision. *Roberts v. Roberts*, 138 Idaho 401, 403, 64 P.3d 327, 329 (2003). A trial court's child custody decision will not be overturned absent an abuse of discretion. *Id.* A trial court does not abuse its discretion as long as the court "recognizes the issue as one of discretion, acts within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reaches its decision through an exercise of reason." *Id.* When the trial court's decisions affect children, the best interests of the child is the primary consideration. *Id.* at 403–04, 329–30.

> "An abuse of discretion occurs when the evidence is insufficient to support a magistrate's conclusion that the interests and welfare of the children would be best served by a particular custody award or modification." *Nelson v. Nelson*, 144 Idaho 710, 713, 170 P.3d 375, 378 (2007). When reviewing the magistrate court's findings of fact, this Court "will not set aside the findings on appeal unless they are clearly erroneous such that they are not based upon substantial and competent evidence." *Id.* Even if the evidence is conflicting, findings of fact based on substantial evidence will not be overturned on appeal. *Id.*
> *Peterson v. Peterson*, 153 Idaho 318, 320–21, 281 P.3d 1096, 1098–99 (2012)

"Modification of child custody may be ordered only when there has been a material, substantial and permanent change of circumstances indicating to the magistrate's satisfaction that a modification would be in the best interests of the child." *Pieper v. Pieper*, 125 Idaho 667, 669, 873 P.2d 921, 923 (1994)). Idaho Code section 32–717 gives a judge wide discretion regarding

custody decisions, subject to some restrictions, with the children's best interests being of paramount importance. I.C. § 32–717; *Hoskinson v. Hoskinson*, 139 Idaho 448, 455, 80 P.3d 1049, 1056 (2003). "[T]he determination of whether to modify child custody is left to the sound discretion of the trial court, and this Court will not attempt to substitute its judgment and discretion for that of the trial court except in cases where the record reflects a clear abuse of discretion." *Levin v. Levin*, 122 Idaho 583, 586, 836 P.2d 529, 532 (1992).

In reviewing an exercise of discretion, this Court must consider: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Evans v. Sayler*, 151 Idaho 223, 226, 254 P.3d 1219, 1222 (2011).

Thus, the issue is whether there is substantial and competent evidence to support the magistrate's conclusion that changing physical custody was in the children's best interests. *Doe v. Doe*, 149 Idaho 669, 671, 239 P.3d 774, 776 (2010). An abuse of discretion occurs when the evidence is insufficient to support a magistrate's conclusion that the interests and welfare of the children would be best served by a particular custody award or modification. *McGriff v. McGriff*, 140 Idaho 642, 645, 99 P.3d 111, 114 (2004). Appellate courts, however, are not permitted to substitute their own view of the evidence for that of the trial court, or to make credibility determinations. *Id.*

In this matter, the Father alleged a material, permanent and substantial change of circumstances occurred warranting a modification of prior orders which consisted of 1: significantly reduced income of the Father and 2: another relocation of the Mother and minor child.

The Magistrate Court concluded that these allegations were shown through the evidence and that "a material, permanent and substantial change of circumstances since the Court's last order in this case in April of 2013 because M has moved from Virginia to Idaho, M plans to move back to Virginia in August of 2017, F has lost his job in the oil fields and earns about a third or twenty-five percent of what he earned there, and M has a history and pattern of moving B often and calls into question the stability of B while in M's care and custody." R. p. 131. Each of these findings was supported by evidence presented in this matter and reasonable conclusions from that evidence. These factors also are more than sufficient to show a material, permanent and substantial change of circumstances.

1. Mother has moved from Virginia to Idaho.

There is clearly no question that this fact was shown in the record at trial. Mother testified as to her current address in Meridian, Idaho (Tr. p. 38) and that she had moved in 2014 from Virginia. (Tr. p. 29) This fact is material, permanent and substantial change of circumstance as the minor child was no longer living across the country. The relocation would allow for the real ability of the Father to have additional and extended visitation. This fact alone would be sufficient to warrant a change in the custody and visitation order.

2. Mother plans to move back to Virginia and Mother has a history and pattern of moving B often and call into question the stability of B while in Mother's care and custody.

Mother testified as to her desire to move back to Virginia (Tr. p. 36) and as to the instability in her daughter's life by the child being in five (5) different schools while the child is only 10 (Tr. p. 33-34) and that she had moved five (5) times since the birth of her child. (Tr. p. 31) This fact is also shown in the various counties this case has traveled to: Ada, Canyon, Bonneville and Bingham.

In *Poesy v. Bunney*, 98 Idaho 258, 561 P.2d 400 (1977), this Court explained:

> While the material, permanent and substantial change standard is a sound legal principle, care must be exercised in its application. The tendency is to search for some greatly altered circumstance in an attempt to pinpoint the change called for by the rule. Thus, the emphasis is placed on defining some change, and making that change appear, in itself, to be material, permanent and substantial. This focus is misleading. The important portion of the standard is that which relates the change in conditions to the best interest of the child. The changed circumstance standard was designed, as a matter of policy, to prevent continuous re-litigation of custody matters. That policy goal, however, is of secondary importance when compared to the best interest of the child, which is the controlling consideration in all custody proceedings. The court must look not only for changes of condition or circumstance which are material, permanent and substantial, but also must thoroughly explore the ramifications, vis-à -vis the best interest of the child, of any change which is evident. What may appear by itself to be a small and insignificant change in circumstances may have significant effects insofar as children are concerned.
>
> Care must also be taken to avoid 'compartmentalizing' consideration of a child's best interest in successive attempts at custody modification. The best interest of a child, like its growth, is a matter of development. An emerging pattern which is not apparent in a first consideration may come into focus at some later time. The court should allow and consider all evidence relevant to a child's interest, not just that evidence which has emerged since previous orders. *Id.* at 261–62, 403–04 (internal citations omitted).

This Court has made it clear that whether a change in conditions is "material" or "substantial" depends upon the impact of the change on the children. *Evans*, 151 Idaho at 226, 254 P.3d at 1222.

The Magistrate Court noted the recent moves of the Mother and the number of schools that B.G.S. had attended in the past year. Additionally, the Magistrate Court had the testimony noted above about the number and times of relocation. The Magistrate Court also noted the procedural history of this case and the previous order which initially allowed the move to Virginia and set out a custody and visitation schedule to accommodate that relocation. Tr. p. 129.

After these findings, the Magistrate Court then, in its discretion, found that it would be in the best interests for B.G.S. to remain in Shelly with Father to provide more stability.

It is clear that the Magistrate Court's decision finding the relocation back to Idaho and the history and pattern of relocating was a material, permanent and substantial change in circumstances when applied to the best interests of B.G.S. Five schools in five years and five moves in ten years would appear to be well within the discretion of the Court to make this determination.

3. Father has lost his job in the oil fields and earns about a third or twenty-five percent of what he earned there.

The Magistrate Court had substantial, factual basis for this determination based on the stipulation of the parties as to their incomes (Tr. p. 22) and the testimony presented in the trial. (Tr. p. 44) The prior Order of the Court had Father's income at $78,000 (Tr. p. 84) and Father testified that he had additional income from overtime in addition to the base. (Tr. p. 43) At the time of trial, Father's income was found to be $45,000. (Tr. p. 130)

This reduction in income is not only a material, permanent and substantial change in circumstances when applied to child support calculations, but also in Father's ability to travel to conduct visitation. Father testified that for each visitation he would have to pay between $1,000.00 to $1,500.00 per trip. (Tr. p. 46) His significant reduction in income impacted not only his ability to pay child support but also his ability to have his ordered visitation.

The Magistrate Court properly found that the reduction in Father's income was a material, permanent and substantial change in circumstances for both child support and visitation.

The Mother's reliance on the cases of *Doe v. Doe*, 161 Idaho 67, 383 P.3d 1237 (2016) and *Evans v. Slayer,* 151 Idaho 223, 254 P.3d 1219 (2011) is misplaced and not relevant to the facts in this matter.

In *Doe,* the issue before that magistrate and the Court on appeal stemmed from the allegation of alienation of the children by the mother. This Court examined the facts and allegations in the record before it and concluded that there was insufficient evidence to support the alienation claim. This had nothing to do with the move, as the move was only the topic upon which the alleged alienation conversations and actions occurred.

In this case, the Magistrate Court's determinations are all based on established facts and are supported by the record herein. Each of these findings has been detailed above. The Magistrate Court's determinations are well within its discretion.

In *Evans,* this Court upheld a determination of a magistrate finding a mother's decision to not attend college was not a material, permanent and substantial change in circumstances. This Court noted that the mother could again change her mind at any time to go to school and that her actions seemed to be exhibiting buyer's remorse for agreeing to the prior order. The focus of this Court and the magistrate was on the impact and change this determination had on the children.

In this matter, the Magistrate Court also based his finding of a material, permanent and substantial change in circumstances on the impact on the child by the parties' actions. This Magistrate Court examined the impact moving had on B.G.S.'s stability, and the testimony presented at trial that Mother was again moving, to determine that the additional relocations had a material, permanent and substantial change in circumstances on the child. The Magistrate Court did exactly what this Court says it is supposed to do in *Evans.* Additionally, the Magistrate Court was not only focused on the relocations, but on all the factors from trial.

On reconsideration, the Mother attempted to execute the same change in position as the mother in *Evans*, by stating that she was no longer going to move to Virginia. The Magistrate Court in this case conducted a proper analysis of the reconsideration motion and denied the same.

The Magistrate Court properly found a material, permanent and substantial change in circumstances to modify the prior orders in this matter for custody and child support. Each of the items listed by the Magistrate Court as a factor for this finding was based on substantial evidence and a reasonable interpretation of that evidence.

II. DID THE MAGISTRATE ERR IN CONCLUDING THAT IT WAS IN THE BEST INTERESTS OF THE MINOR CHILD TO CHANGE PRIMARY CUSTODY IN ITS JANUARY 6, 2017 DECISION AND REAFFIRMING THAT DECISION IN ITS ORDER RE MOTION TO RECONSIDER?

The Mother next argues that the Magistrate Court erred in changing primary custody to the Father. This is incorrect. The Magistrate Court properly examined the facts of the case, applied correct, relevant law, and acted within the reasonable bounds of discretion.

The Mother's arguments in this matter center around the case of *Lamont v. Lamont,* 158 Idaho 353, 347 P.3d 645 (2015). Mother would have this Court believe that *Lamont* stands for the few factual issues presented in her briefing, *ie* better income potential after moving, educational needs, and relationship with the other parent. In fact, *Lamont* did not address any of these items, nor place any weight on these or any other factors. The Court in *Lamont* merely listed several of the numerous items the magistrate court in that case considered in making its determination. The Court then went on to note all the various legal standards governing the

exercise of discretion for a court to make a determination of relocation and primary custody. Mother's reliance on any individual factual statements is misplaced and inappropriate.

In this matter, the Magistrate Court noted that the determination of primary custody was based on the discretion of the court. It listed the relevant facts from the testimony of the parties and then noted the legal standards, questions and analysis to be performed in exercising its discretion. The Magistrate Court listed and analyzed each of the listed factors of I.C.§32-717 with the facts presented during the trial. Each of these findings is soundly based on the facts presented at trial. The conclusion of the Magistrate Court was reached with a decision within the legal requirements and the facts presented to the Court. The Magistrate Court determined that it would be in the best interests of B.G.S. to have Father exercise primary custody and Mother receive visitation. The Magistrate Court determined that Father was the parent in the best position to meet the needs of B.G.S. and provide her with a stable home.

The Magistrate Court likewise utilized the same process and examination of the facts and applicable law in its determination on the Motion to Reconsider. The Magistrate Court noted that a determination of a reconsideration was within its discretion. The Magistrate Court examined the facts and arguments from both the reconsideration and trial and applied them to the discretionary standard. The Order from the reconsideration was well within the discretion of the Magistrate Court.

Mother also seeks to isolate each and every finding from the Magistrate Court and claim each is insufficient to warrant a change in custody. This argument, however, is not the standard. It is not necessary for each and every finding of the Magistrate Court to be self-sufficient to justify the change of custody, but rather a determination of all of the factors together. It is the providence of the trial court to weight to the evidence and each factor and a Court on appeal will

not substitute its view of the facts for that of the trial court. *King v. King*, 137 Idaho 438, 442, 50 P.3d 453, 457 (2002).

The determinations by the Magistrate Court were made based on facts, applicable law and reasonable discretion. The fact that the Magistrate Court did not view the facts the same way as the Mother wishes them to be viewed is not an abuse of discretion.

III. DID THE MAGISTRATE ERR IN HIS FINDINGS OF FACTS IN ITS JANUARY 6, 2017 DECISION AND IN ITS ORDER RE MOTION TO RECONSIDER?

Mother's final arguments claim the Magistrate Court did not provide sufficient findings of fact. This is incorrect and completely misstates the Memorandum Decision and Order.

In the Court's Memorandum Decision and Order, the court included a "Findings of Fact" section. In this section, the Magistrate Court stated the facts that were testified to by each party that he had accepted. It is clear from the Transcript of the hearing that not everything presented by each witness was included in this "Findings of Fact" determination by the Magistrate Court. Each of the findings of the Magistrate Court is consistent with the testimony of the parties. In this way, each is based on substantial and competent evidence.

"This Court limits its review of a trial court's decision to determining 'whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law.' " *City of Meridian v. Petra Inc.*, 154 Idaho 425, 434–35, 299 P.3d 232, 241–42 (2013) (quoting *Shore v. Peterson*, 146 Idaho 903, 907, 204 P.3d 1114, 1118 (2009)). "Unless the trial court's findings of fact are clearly erroneous, they will not be set aside." *Id.* at 435, 299 P.3d at 242. "A district court's findings of fact in a court-tried case are construed liberally on appeal in favor of the judgment entered." *Elec. Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 820,

41 P.3d 242, 248 (2001). "It is the province of the trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses." *Id.*

Here, the Magistrate Court heard the testimony of the parties, examined their credibility and even engaged in questioning of the witnesses. The Magistrate Court then set out the relevant testimony from each witness as its findings of fact for this case. This is precisely the appropriate procedure. It appears that the Mother would require the Magistrate Court to make each statement in its "Findings of Fact" and then conclude the statement with "and the Court finds it so."

Mother additionally argues that the Magistrate Court's determinations in the Order re Motion for Reconsideration were without factual basis. Each is discussed below.

1. Appellant has not made any serious attempts to foster a good relationship between Father and B.G.S.

The Magistrate Court noted this was based on the testimony surrounding Mother not being willing to work with Father for additional time after the move back to Idaho. This is factually supported by the testimony at trial. Tr. pp. 69-71

2. Mother is insensitive to the need of Father and B.G.S. to have a good relationship.

The Magistrate Court's full statement on this matter is "M's trial testimony that she was moving to Virginia to further her career and then M's affidavits at the Motion to Reconsider that M was not moving to Virginia if M couldn't take B with her could mean that M is a dedicated parent to B or it could mean that M is insensitive to the need for F and B to have a reasonably good parent child relationship." This is clear that the factual basis for this determination is the testimony of Mother that she was going to move and then, after the Decision in this matter that she was not going to move. Both of these statements are factually based. The Magistrate Court was noting the possible implications of the change in testimony by the Mother. Mother testified

that she would move to Virginia if B.G.S. were to remain in Shelly, Idaho (Tr. p. 116), and she would move as soon as B.G.S. turned 18 if she were to remain in the Boise area.(Tr. p. 115)

3. Father will make Mother's and B.G.S.'s relationship a priority.

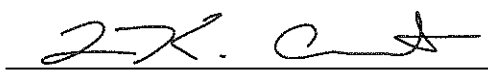
This determination by the Magistrate Court is based on the trial testimony of Father. Father testified that he would work to ensure B.G.S. was able to consistently see her mother, (Tr. p. 48) and that Mother could be involved (Tr. p. 51).

Each of the alleged improper factual determination alleged by the Father were in fact based on reliable and substantial evidence from the trial. Again, just because the Magistrate Court does not see the facts the way the Mother wants does not mean they are wrong.

CONCLUSION

Mother's appeal of this matter is without basis and any legitimate legal argument. Mother is simply unhappy with the determination of the Magistrate Court and seeks this Court to substitute its opinions and factual determinations for the trial court. Each of the Magistrate Court's findings is based on substantial evidence, reasonable inferences, and a proper exercise of the trial court's discretion. The appeal should be dismissed.

Respectfully submitted this 17th day of August, 2017.



Larren K. Covert, Esq.
Of Swafford Law, PC
Attorney for the Father

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day I caused to be served a true and correct copy of the foregoing document on the parties designated below and by the method of delivery indicated:

Tracy W. Gorman
428 Park Ave.
Idaho Falls, ID 83402

☒ MAILING
□ FAXING
□ HAND DELIVERY
□ COURTHOUSE BOX

Dated this 17th day of August, 2017.

Larren K. Covert, Esq.
Of Swafford Law, PC
Attorney for the Father